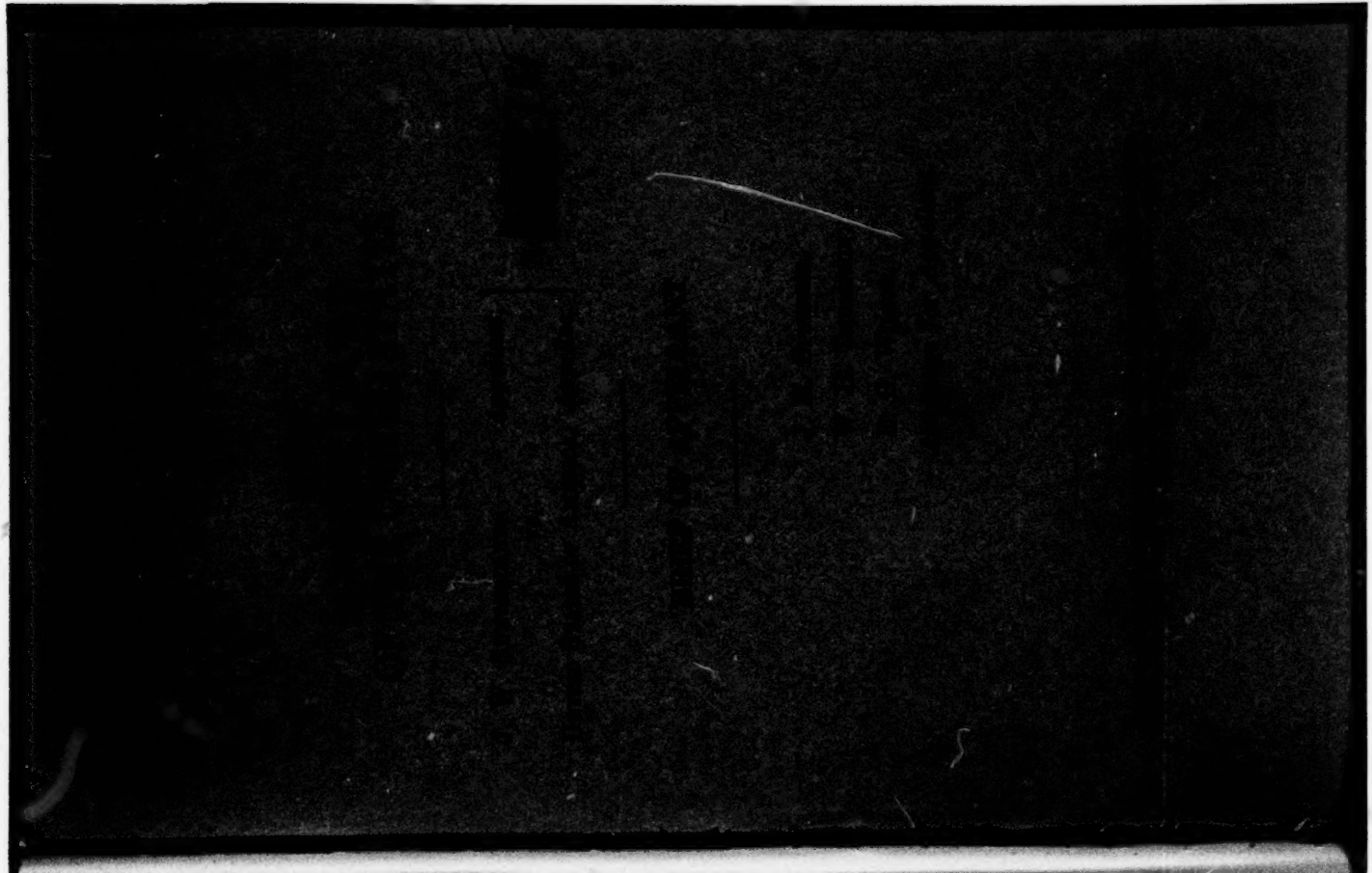

INDEX

IN THE

SUPREME COURT OF THE UNITED STATES

J. W. SUNDERLAND, - - *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.
No. 355.

BRIEF OF APPELLANT

Statement of Facts

Nathaniel Perryman is a half-blood citizen of the Creek Nation of Indians and is enrolled as such opposite No. 2220. By reason of his tribal relation there was allotted to him the East Half of the Northeast Quarter and the Southwest Quarter of the Northeast Quarter of Section 7-19-13 as surplus lands. And there was allotted to him, as his homestead, the Northwest Quarter of the Northeast Quarter of Section 7-19-13 in Tulsa County, Oklahoma.

Grant R. McCullough and L. K. Cone are white people and prior to the 24th day of June, 1918, were the owners of the Southeast Quarter of Section 8-16-13. The land owned by Grant R. McCullough and L. K. Cone was, prior to the 24th day of

June, 1918, and had been since July 10th, 1909, unrestricted land and subject to trade and commerce among the people of the State of Oklahoma, and subject to the taxing power of the State, and subject to the judgments, decrees, orders and processes of the Courts of the State of Oklahoma, and was subject to litigation in the State Courts.

On the 24th day of June, 1918, Grant R. McCullough and his wife, and L. K. Cone and his wife, conveyed by warranty deed to Nathaniel Perryman the lands last above described. On November 30th, 1918, Nathaniel Perryman, and wife, conveyed by warranty deed the lands last above described to J. W. Sunderland, the appellant in this case.

On May 21st, 1919, the appellee filed in the United States Court within and for the Eastern District of Oklahoma its bill of complaint by which, it sought to cancel the deed made, executed and delivered by Nathaniel Perryman and his wife, Fannie Perryman, to J. W. Sunderland, the appellant herein, by which the Perrymans conveyed to Sunderland the Southeast Quarter of Section 8, Township 16 North of Range 13 East, located in Tulsa County, Oklahoma.

In the bill it is substantially alleged that Nathaniel Perryman is a one-half blood Creek citizen, enrolled opposite No. 2220 of the approved rolls of citizens by blood of the Creek Nation; that there

was allotted to Nathaniel Perryman certain lands which are not described, forty acres of which constituted his homestead; that permission was asked and received of the Secretary of the Interior to sell a portion of the homestead, to-wit, 10 acres, which was accordingly done, and a portion of the proceeds derived from such sale was invested in the lands above described; that pursuant to the rules and regulations of the Secretary of the Interior there was incorporated in the habendum clause to the said Nathaniel Perryman a restriction against alienation, by virtue of which any lease, deed, mortgage, power of attorney, contract to sell or other instrument affecting the lands therein described or the title thereto, executed during the life of said grantee at any time prior to April 26, 1931, unless made with the consent of and approval by the Secretary of the Interior, should not be of any force or effect or capable of confirmation or ratification; that by reason of said restriction against alienation at any time prior to the 26th day of April, 1931, any conveyance by the said Nathaniel Perryman was illegal and void because of and for the reason that the lands were purchased with released funds derived from the sale of a portion of the homestead allotted to Nathaniel Perryman (Record, pp. 1-13, inclusive).

By an amendment filed to the Bill of Complaint the United States sought to vacate and set aside a

judgment rendered by the Superior Court of Tulsa County, Oklahoma, quieting the title to said lands in the appellant. (Record, pp. 1 to 13, inclusive.) To this bill of complaint, the appellant filed a motion to dismiss for want of equity (Record, p. 13), which was duly presented to the District Court and overruled and exceptions to the order of the court duly saved. (Record, p. 14.) The appellant then filed his answer denying generally and specifically all of the allegations of the bill of complaint and pleading further:

That there was no restriction against alienation incorporated in the deed, by which the lands were conveyed to Nathaniel Perryman pursuant to any rules or regulations of the Secretary of the Interior; that any restriction therein contained was not authorized by such rules and regulations; that the Secretary of the Interior had no authority to incorporate in the deed restrictions against the alienation of said real estate; that said land described in the bill of complaint was not subject to restrictions by law against alienation or incumbrance, but on the contrary, said land was not at any time prior to or since the execution of said deed, subject to any restriction upon the alienation or encumbrance by Nathaniel Perryman or any other person. The appellant further pleaded a judgment rendered in his favor in the Superior Court of Tulsa County, Oklahoma, on the 28th day of April,

1919, by which the title to said land was quieted in the appellant (Record, pp. 14 to 22, inclusive).

The appellant pleaded further that at the time of the purchase of the lands in dispute here, the said Nathaniel Perryman was the owner of a portion of his original homestead allotment and that the value thereof was about $30,000. The answer filed by the appellant further shows the derainment of title to him as follows, to-wit: The lands in dispute here were allotted to Daniel Bigpond by the Muskogee-Creek Nation on the 14th day of April, 1904; that said Daniel Bigpond died on the 29th day of April, 1907, leaving surviving him as his only heirs at law his widow, Nancy Bigpond, and a son, Albert Bigpond, and his daughter, Eliza Bigpond; that on the 15th day of December, 1908, the said Nancy Bigpond sold and conveyed her interest in and to said premises to one H. U. Bartlett, who, on the 14th day of February, 1911, sold and conveyed his interest to Grant R. McCullough and L. K. Cone; that on July 10, 1909, the interests of the said Albert Bigpond and Eliza Bigpond, minors, were duly sold and conveyed by their guardian to Grant R. McCullough, and on the 24th day of June, 1918, the said Grant R. McCullough and wife and L. K. Cone and wife sold and conveyed said real estate to Nathaniel Perryman, who, on November 30, 1918, sold and conveyed said premises to the appellant. (Record, p. 18.) The answer filed by

the appellant was in no way denied and therefore the issues raised by the allegations therein stand admitted.

On the issues thus joined a trial was had to the Court which was concluded on the 2nd day of January, 1922, and thereupon the Court rendered judgment cancelling and setting aside the deed made, executed and delivered by Nathaniel Perryman and Fannie Perryman to appellant on the 30th day of November, 1918, and vacating and setting aside the judgment of the Superior Court of Tulsa County, Oklahoma, made and entered on the 28th day of April, 1919, quieting the title to said premises in the appellant, to which decree and judgment of the court the appellant duly reserved an exception. (Record, pp. 22, 23, 24 and 25.)

It is thus seen that the power of the Secretary of the Interior to impose restrictions against alienation at any time prior to the 26th day of April, 1931, on land purchased with released funds, which at the time of purchase, and for a long time prior thereto, WERE AND HAVE BEEN FREE FROM ALL RESTRICTIONS AND THE SUBJECT OF TRADE AND COMMERCE AND CAPABLE OF BEING SOLD AND TRANSFERRED FROM HAND TO HAND, GOVERNED SOLELY BY THE LAWS OF THE STATE OF OKLAHOMA RESPECTING CONVEYANCES, is involved in

this case and is squarely presented to this Court for its adjudication.

Within due time the appellant prosecuted his appeal to the Eighth United States Circuit Court of Appeals. (Record, pp. 87 to 96).

The appeal was heard in the Eighth United States Circuit Court of Appeals on the 14th day of January, 1923, and on the 5th day of March, 1923, thereafter the Circuit Court of appeals rendered judgment affirming the judgment of the trial court. (Record, pp. 98 to 103.)

April 10, 1923, the appellant prayed an appeal to this Court, which was allowed (Record, pp. 103-4-5-6-7-8-9), the assignments of error being:

> "IN U. S. CIRCUIT COURT OF APPEALS
> ASSIGNMENT OF ERRORS—Filed May 7, 1923.
>
> Now on this the 10th day of April, 1923, comes J. W. Sunderland, appellant in the above entitled cause of action and defendant in the trial court, and alleges and says:
>
> That the decree made and entered and filed in this case on or about the 5th day of March, A. D. 1923, rendering judgment against the appellant and affirming the judgment of the lower Court, to-wit, The United States District Court within and for the Eastern District of the State of Oklahoma, cancelling and annulling the deed executed and delivered on the 20th day of November, 1918, by Nathaniel Perryman and Fannie

Perryman in favor of the defendant, J. W. Sunderland, and also cancelling and annulling the judgment rendered in favor of the defendant, J. W. Sunderland, quieting the title in him in the Superior Court of Tulsa County, Oklahoma, on the 28th day of April, 1919, in Civil Cause No. 5919, which said property is described as follows, to-wit:

> Southeast Quarter of Section 8, Township 16 North, of Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma,

is erroneous and unjust to him, the said J. W. Sunderland, for the following reasons which he states are and assigns as erroneous and unjust and injurious to him in said action and in the decree of the said lower court and in the decree of the said appellate court and in said decrees, to-wit:

First: The decree of the appellate court made and entered as aforesaid on the 5th day of March, 1923, affirming the judgment and decree of the said lower court, to-wit, the United States District Court within and for the Eastern District of the State of Oklahoma, is injurious and unjust and erroneous.

(a) No such questions were involved in the appeal as were decided by said United States Circuit Court of Appeals.

(b) The said United States Circuit Court of Appeals failed to decide the matter and things in controversy involved and inhering in the appeal.

(c) It was never contended in the lower court or in the appellate court that Congress

did not have power and authority to delegate authority to the Secretary of the Interior.

(d) It was never contended in the lower court nor said appellate court that when Oklahoma became a state, Congress had no power nor authority to legislate respecting the Indians within the state.

Second: The appellant alleges and says that there was presented to said Circuit Court of Appeals for its disposition and also which are presented to this Court for its disposition, and which this appellant alleges as grounds of error, the following specifications of error, to-wit:

Third: Because the court erred in overruling the motion of the defendant J. W. Sunderland to dismiss the bill for want of equity, and for the further reason that said bill of complaint and the allegations therein contained do not state sufficient facts to constitute a cause of action in favor of the plaintiff and against the defendant J. W. Sunderland.

Fourth: Because the court erred in rendering a judgment cancelling the deed hereinbefore mentioned, made, executed and delivered on the 30th day of November, 1918, by Nathaniel Perryman, and Fannie Perryman, running to and in favor of defendant J. W. Sunderland.

Fifth: Because the court erred in vacating, annulling, setting aside and for naught holding the judgment rendered by the Superior Court of Tulsa County, Oklahoma, on April 28th, 1919, wherein the said Superior Court did on said day render judgment in favor of

the defendant, J. W. Sunderland, quieting the title in the above described premises in the said J. W. Sunderland.

Sixth: Because the court erred in rendering judgment quieting the title in and to the Southeast Quarter of Section 8, Township 16 North, of Range 13 East, containing 160 acres, more or less, in Tulsa County, Oklahoma, in Nathaniel Perryman.

Seventh: Because the Court erred as a matter of law in holding that the Secretary of the Interior is clothed with the authority to impose restrictions upon unrestricted real estate within the boundary of the State of Oklahoma, upon which no restrictions existed at the time of the attempted imposition of restrictions against alienation by the Secretary of the Interior; and in holding that the Act of Congress approved May 27th, 1908, conferred upon the Secretary of the Interior the right to impose restrictions against alienation, a part of which Act reads as follows:

'• • • All homesteads of said allottees enrolled as mixed-blood Indians having one-half or more than one-half Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or any other encumbrance prior to April 26th, 1931, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposition of proceeds for the benefit of the respective Indians as he may prescribe.'

Eighth: The court erred in holding as a matter of law and evidence that the Secretary of the Interior did impose restrictions against

Nathaniel Perryman at the time the above described premises was purchased from Grant R. McCullough, et al., for the reason the evidence in the case fails wholly and utterly to prove that the Secretary of the Interior did impose restrictions against alienation upon said premises, the evidence in that regard being merely a telegram which was introduced as plaintiff's exhibit No. 17, and which reads as follows:

'Western Union, July 2, 1918..
Parker, Superintendent, Muskogee, Oklahoma.

Referring your telegram and letter June 27th and 28th respectively, authority granted you to invest on behalf of Nathaniel Perryman, Nine Thousand Six Hundred Dollars in purchase property therein described using a restricted form of deed.

(Signed) C. P. Hauk, Acting Asst Commission.

Land F. T. 52766-18, 55315,18 VWR, CPH. JWH. M.'

Ninth: Because the court erred in holding as a matter of law, that the Act of Congress of May 27th, 1908, or any other Act of Congress, ever conferred upon the Secretary of the Interior of the United States of America, the right and authority to impose restrictions upon the lands purchased with released funds, because, forsooth the Act provides:

'That from and after sixty days from the date of this Act, the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes,' etc.

The Act itself limiting restrictions against alienation upon lands, as to lands that had

prior thereto and after the act been allotted.

Tenth. The court erred in holding that the Secretary of the Interior has the power or authority to provide in a deed to lands purchased with restricted funds—

"• • • Subject to the conditions that no lease or mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described, or the title thereto, executed during the lifetime of said grantee, at any time prior to April 26, 1921, shall be of no force or effect, or capable of confirmation or ratification, unless made with the consent of, and approved by the Secretary of the Interior' had such authority at the time it was alleged that the above described property was purchased from Nathaniel Perryman.

Eleventh: The court erred in finding as a matter of law and evidence, that the sale of the above described lands to J. W. Sunderland, by the said Nathaniel Perryman and Fannie Perryman, was not made with the consent or approval of the Secretary of the Interior, for, as a matter of fact, the evidence introduced by the government failed utterly to show that the Secretary of the Interior never gave his approval of the sale of said lands by the said Nathaniel Perryman and Fannie Perryman to J. W. Sunderland.

• • • • • • •

Twelfth: The Court erred as a matter of law in rendering judgment finding that the Secretary of the Interior of the United States of America has the authority to impose restrictions on otherwise unrestricted

lands so as to interfere with the free trade and commerce between the people of this state and of the several states without the consent of the Secretary of the Interior, because forsooth the exercise of such power is contrary to and in violation of Section 3 of Article 4 of the Constitution of the United States, in that it denies the admission of Oklahoma into the Union on an equal footing with other states, in that it denies free trade and commerce between the citizens of this state and of the several states with the citizens of this state.

Fourteenth: The authority of the Secretary of the Interior exercising the right to impose restrictions upon otherwise unrestricted land is illegal and void and contravenes Section 1 of Article 1 of the Constitution of the United States, in that it attempts to confer upon the Secretary of the Interior the right and authority to legislate upon the subject and thereby formulate, create and promulgate a set of rules whereby he is authorized to impose restrictions in violation of said Section 1 which confers upon the Congress of the United States itself the authority to legislate and define by appropriate legislation the power and authority of the various agencies of the government.

Fifteenth: The decree violates the spirit of the Constitution of the United States as enunciated in its preamble.

* * * * * * *

Seventeenth: The decree of the District Court of the Eastern District of Oklahoma violates the 10th Amendment to the Constitution of the United States, in that there

is no authority conferred in the constitution whereby the United States can interfere with the state in the enactment of laws concerning conveyances of real estate. And further, if the Secretary of the Interior has the authority to impose restrictions, the same would be against the right of taxation, and the state would not have the authority to levy and collect taxes on real estate where a restriction is thus imposed within the State of Oklahoma; and the right to levy and collect taxes on real estate within the state, not the property of the United States, but that of a citizen of the state, and so long as such levy and collection of taxes is on real estate within the state, not the property of the United States, but that of a citizen of the state, and so long as such levy and collection of taxes conforms to due process of law and equal protection of the law, is a state right, which the Congress cannot abrogate.

Eighteenth: The decree violates Section 3 of Article 4 of the Constitution of the United States in that it holds in effect a denial of the right of the State of Oklahoma to tax her own real estate, and a denial of this right is an admission of Oklahoma, into the United States on an unequal footing with the other states forming the Union; and further, that it denies to the State of Oklahoma, the right and authority to legislate respecting trade and commerce in real estate among the people of the State of Oklahoma and the people of other states and, therefore, is not the admission of Oklahoma on an unequal footing with the other states of the Union.

Nineteenth: The decree violates Section 4 of Article 4 of the Constitution of the United

States in that it gives the United States authority to destroy all forms of government within the state, as the state cannot exist without its right to levy and collect taxes on its real estate, and this decree indirectly denies to the state the right to levy and collect taxes upon real estate wherein restrictions are imposed by the Act of the Secretary of the Interior upon otherwise unrestricted and taxable lands.

Twentieth: The decree violates the 5th Amendment of the Constitution of the United States in that it takes the property out of the legislative control of the state and places the same within the control of the United States without due process of law.

* * * * * * *

Twenty-second: The court erred in not rendering judgment in favor of the defendant, J. W. Sunderland, upon the evidence introduced by both the United States and the defendant, J. W. Sunderland.

Wherefore, the defendant prays that the decree of the lower court rendering judgment cancelling the deed hereinbefore mentioned and also the judgment of the Superior Court of Tulsa County, Oklahoma, hereinbefore mentioned, and in vacating the said decree and setting the same aside, and holding the same for naught, be reserved, and for the costs of this appeal and for all other proper relief, and also the decree of the Circuit Court of Appeals affirming said judgment.

J. M. Springer, & Elbridge G. Wilson,
Attorneys for Appellant."

(File endorsement omitted.) (Record, 104 to 109.)

Brief and Argument

For convenience the appellant will group the propositions relied upon for a reversal into three subdivisions:

First: The Congress of the United States is without power or authority to authorize the Secretary of the Interior to impose restrictions on released lands that have passed to private ownership and subject to the taxing power of the state and the judgments, decrees and orders of the state courts and that are the subject of trade and commerce.

Second: Conceding that Congress has authority to authorize the Secretary of the Interior to impose restrictions on unrestricted lands that have become subject to the taxing power of the state and subject to the judgments, decrees and orders of the Courts of the State and are the subject of trade and commerce among the people of the state in which the land is located, yet, nevertheless, as respects the subject matter of this action, Congress never exercised such power either by general or special legislation, nor has it conferred such authority upon the Secretary of the Interior, by legislative grant of power, the Act of May 27, 1908, conferring, as has been supposed, no such power.

Third: The evidence in this case is wholly insufficient to support the judgment and conclusion of the trial court, there being no competent, relevant or material evidence introduced to support such judgment.

The two first propositions suggested are sufficiently raised by the motion to dismiss the bill hereinbefore referred to, and also by objecting to the introduction of testimony, and also by the exception to the decree and judgment of the court.

The land in controversy was unrestricted at the time of the purchase from Grant R. McCullough and others, and had been for a number of years prior thereto. The land had become subject to the laws of the State of Oklahoma affecting real estate including its power to bond the state and subject to the judgments, decrees and orders of the courts of the State of Oklahoma and was exolusively within the control of the laws of the state, unrestricted and unhampered by any federal control or restrictions of any kind or character. The record fully discloses this state of facts. In view of this state of the record, we assert that the court erred in overruling the motion to dismiss and in rendering pudgment in favor of the appellee for the reason that the order and judgment of the Court is in violation of Section 8 of Article 1 of the Constitution of the United States, which declares the subjects concerning which Congress shall have power to legislate. A considera-

tion of this section of the Constitution leads inevitably to the conclusion that this government is one of certain, definite, specific and enumerated powers.

The government can claim no powers which are not granted to it by the Constitution and the powers actually granted must be such as are expressly enumerated, or which necessarily arise by implication. In *Martin* v. *Hunter,* 1st *Wheat* 304, 326, 4th L. Ed. 97, 102, this Court said:

> "The government of the United States is one of delegated, limited and enumerated powers." *U. S.* v. *Harris,* 106 U. S. 629.

Turning then to the powers enumerated by Section 8 of Article 1 of the Constitution of the United States, we find nothing therein which authorizes or confers upon Congress the power to legislate respecting the property of a state, or property belonging to citizens not of Indian extraction within a state. Nor can it be implied from any of the powers expressely granted that Congress is given authority to legislate respecting unrestricted property within a state owned by citizens not of Indian extraction within the prohibited degrees. The last paragraph of the section which authorized Congress to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, is not the

delegation of a new and independent power, but is simply a provision for making effective the powers already granted by the Constitution itself; (4 *Wheat* 421), and there being no general grant of legislative power, it has become an accepted constitutional interpretation that this is a government of enumerated and limited powers. *McCullough* v. *Maryland,* 4 Wheat 405, 4 L. Ed. 601. There being nothing in the enumerated powers contained in Section 8 of Araicle 1, conferring upon the Congress the authority to legislate respecting the property of a state or of white citizens within a state, we must look to other provisions in the constitution to see if they contain such provisions.

Section 3 of Article 4 provides:

> 'That Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claim of the United States or of any particular state."

This provision of the Constitution has been somewhat dealt with in the case of *State of Kansas* v. *Colorado,* 51 L. Ed. 956, where this Court, speaking through Justice Brewer in construing this provision, made use of this language:

> 'The full scope of this paragraph has never been fully settled. Primarily, at least, it is a grant of power to the United States of control of its property. This is implied by the

words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legisltive control over the territory as distinguished from the States of the Union.

Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto, but clearly, *it does not grant to Congress any legislative control over the state and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.''*

The exercise of the legislative authority over the individual state or the property of the people within the state, is purely a state right over which Congress has no power to take action or legislate It is enough for the purpose of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams, and other waters.

—*Martin* v. *Waddell*, 16 Pet. 367, 10 L. Ed. 997;

—*Pollard* v. *Hagan*, 3rd How. 212, 11 L. Ed. 565;

—*Pollard* v. *Kibbe*, 9 How. 471, 13 L. Ed. 220;

—*Barney* v .*Keokuk*, 94 U. S. 324, 24 L. Ed. 224;

—*St. Louis* v. *Myers*, 113 U. S. 566, 28 L. Ed. 1131;

—*Packer* v. *Bird*, 137 U. S. 661, 34 L. Ed. 819;

—*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. Ed. 428;

—*Kaukana Water Power Co.* v. *Green Bay N. M. Canal Co.*, 142 U. S. 254, 35 L. Ed. 1004;

—*Shivley* v. *Bowlby*, 152 U. S. 1, 38 L. Ed. 331;

—*St. Anthony Falls Water Power Company* v. *St. Paul Water Commissioners*, 168 U. S. 349, 42 L. Ed. 497;

—*Kean* v. *Calumet Canal Improvement Company*, 190 U. S. 452, 47 L. Ed. 1134.

An examination of these authorities is convincing that Congress is powerless under the Constitution to legislate respecting the property of a state, and this leads us to a consideration of what is meant by a State. Personal property belongs to the individual and can be removed from the state, but real estate belongs primarily to, and within certain territorial boundaries constitutes, the State.

—*Van Brocklin* v. *Anderson*, 117 U. S. 167;

—*Pollard* v. *Hagan*, 3 How. 212.

A state is a political subdivision of the United States and consists of the territory within certain bounds and the people that reside in it, and is, so far as the powers of Congress un-

der the constitution are concerned, a separate and distinct sovereignty; and Congress is without power to legislate concerning the real estate within the boundaries of a state, not the property of the United States.

And all existing laws in so far as such law is intended to authorize the Secretary of the Interior to take from the State of Oklahoma the right to levy and collect taxes upon real estate within its borders, of the right to take from trade and commerce among the people of the state any particular tract of land, the Indian title to which has been extinguished, the same not being the property of the United States, was not made in pursuance of the Constitution of the United States for the government can claim no powers which are not granted to it by the Constitution and the powers actually granted must be such as are expressly given or given by necessary implication. Therefore, if the Act in question can be held to confer upon the Secretary of the Interior the right to impose restrictions upon unrestricted lands, the same is absolutely illegal and void and of no force or effect whatever, as being an invasion of the rights of the state.

—*Martin* v. *Hunter's Lessee*, 1 *Wheat* 326; Federalist (Hamilton's Essays No. 78);

—*U. S.* v. *Harris*, 106 U. S. 636.

In connection with a discussion of this subject

there remains yet another question to be dealt with.

It must be kept in view that the appellant contends that the Act of May 27, 1908, confers no authority whatever, upon the Secretary of the Interior to impose restrictions on unrestricted lands. Nevertheless, the Circuit Court of Appeals in *U. S.* v. *Law,* 250 Fed. 218, has in effect held that the Secretary of the Interior has such authority. however, we defer a consideration of that question for the present.

Turning again to the powers of Congress, it is our contention that, conceding for the present for the purpose of argument, that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions upon lands from which all restrictions had previously been removed, and the lands passed to the control of the state and into the channels of trade and commerce among the people of the state, then such act is in violation of the 10th Amendment to the Constitution of the United States, which is:

> 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively or to the people."

It must be borne in mind that the first ten amendments to the Constitution of the United States were intended to be a limitation upon the

powers of Congress to interfere with State's rights, and it would seem that the present case furnishes a very good illustration of the reason why the tenth amendment in particular was adopted, because a construction of the constitution is made absolutely certain by this amendment. After enumerating what powers concerning which Congress may legislate, the framers of the Constitution were determined that no interpretation should be placed upon it of such a nature that, while certain enumerated powers were granted, but for the benefit of the whole, legislative powers affecting the Nation belong to Congress, although not expressed in the grant of the powers, and so as to cut off such a judicial interpretation of the grant of powers, the tenth amendment was adopted.

The Constitution starts out by saying, "we, the people", showing conclusively that the power was at all times reserved in the hands of the people, and the tenth amendment was not intended to be a distribution of power but was intended as a reservation of powers in the states or "in the people as a whole." To now say that Congress has power to hamper with restrictions free trade and commerce within a state by imposing restrictions upon unrestricted lands, lands that had become subject to the taxing power of the state; lands that had become subject to the bonded indebtedness of the state, lands that had become subject to the judgments, decrees and orders of the

Courts of the State, would be to nullify the effect of the 10th amendment. In discussing the very question under consideration here, this Court in *Kansas* v. *Colorado, supra,* makes use of this very pertinent language:

> "As to those lands within the limits of the states, at least the Western states, the national government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be faund mainly, if not only, in the Western and newer states, *yet the powers of the National Government within the limits of those states are the same—no greater or no less—than those within the limits of the original thirteen* and it would be strange, if, in the absence of a definite grant of power, the Nationel Government could enter the territory of the states along the Atlantic and legislate in respect to improving, by irrigation or otherwise, the lands within its borders."

We are thus brought to the consideration of another question. It is the contention of the appellant that, conceding for the present that the Act of May 27, 1908, confers upon the Secretary of the Interior the authority to impose restrictions upon unrestricted lands, the same is in violation of Section 3 or Article 4 of the Constitution which declared: "New states may be admitted by Congress into this Union, etc.", because this

Court in the case of *Coyle* v. *Smith,* 221 U. S. 559, holds that new states may be admitted by Congress into the Union, but that they come in on an equal footing with the original states.

—*Pollard's Lessee* v. *Hagan,* 3 How. 212;

—*Case* v. *Toftus,* 39 Fed. 730.

Summing up our first contention, we assert that if, by any judicial interpretation it can be held that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions against alienation upon unrestricted lands, that the same is illegal and void because the same is contrary to and in violation of Section 8 of Article 1 of the Constitution of the United States, and Section 3 or Article 4 of the Constitution of the United States because, as we have seen, this is a government of definite, specific enumerated and limited powers, and these provisions of the Constitution enumerate what powers Congress may exercise and what property, concerning which Congress may legislate, and no sanction for such legislation can be found in any of these provisions. We contend further that the conferring of such powers is in direct violation of the 10th amendment to the Constitution, which gives to the State of Oklahoma the exclusive right to legislate concerning the lands within its borders, not the property of the United States, and it is our contention that the authorities to which reference is above made fully sustain our contention.

We turn now to a consideration of the second point raised by these proceedings. Notwithstanding the Eighth Circuit Court of Appeals has held in the Law case, *supra,* that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions upon lands where such lands have been purchased with restricted funds, we assert that the Act confers no such authority, and that the Law case has no support in either the Act, reason or logic, and we contend further that the law case is in direct conflict with *McCurdy, County Treas. of Osage County, Okla.,* v. *The U. S.,* 246 U. S. 263, and also the case of the *United States* v. *P. W. Gray,* 284 Fed. 103, and also the case of *United States* v. *J. P. Ranson,* 284 Fed. 108.

It must be kept in view that the allegations of the bill in substance are: That Nathaniel Perryman is a half-blood Creek Indian, that there was allotted to him certain lands; that the lands thus allotted became and were his homestead; that by and with the consent, permission and authority of the Secretary of the Interior, restrictions against alienation were removed and that a part of his homestead was sold, to-wit, ten acres; that the proceeds thus derived from the sale of the lands were invested in the lands in controversy in this law suit, which were unrestricted lands.

It must be borne in mind that the answer filed in this case denies that the homestead of Nathaniel

Perryman was sold, but alleges that the homestead allotted to him he still owns and did at the time of the institution of this case, and that it was worth, at that time, approximately $30,000.00. It must be borne in mind also that the record in this case fully discloses that the land in controversy was and had been for a long time prior to the conveyance by Grant R. McCullough, et al., to Nathaniel Perryman, released from all restrictions, and was subject to the taxing power of the state, the bonded indebtedness of the state, the judgments, orders and decrees of the courts of the state, and was the subject of trade and commerce among the people of this and other states.

The bill of complaint, which was held good as against the motion to dismiss, and the judgment of the trial court, are predicated upon the assumption that the Act of May 27, 1908, confers upon the Secretary of the Interior the right to impose restrictions on land under the circumstances disclosed by the record in this case.

That part of the Act of May 27, 1908, necessary to a proper understanding of the question involved here, reads as follows:

> "The Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore."

The Act further provides:

> "That from and after sixty days from the

date of this Act, the status of the *lands allotted heretofore or hereafter to allottees of the Five Civilzed Tribes* shall be as regards restrictions or alienations or any incumbrances, as follows: All lands, including homesteads, of said allottees enrolled as inter-married whites, as freedmen and as mixed blood Indians having less than half Indian blood, including minors, shall be free from restrictions. Of lands, excepting homesteads of said allottees, enrolled as mixed blood Indians having half or more than half and less than three-fourths Indian blood shall be frii from all restrictions. All homesteads of said allottees enrolled as mixed blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney or other incumbrance prior to April 26, 1931, except that the Secretary of Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

As reflecting the intention of Congress, the language of the Act becomes significant to a proper understanding of the question under consideration here. The language of the Act is:

> *"The lands allotted hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions or alienation or any incumbrances, etc."*

It is thus seen that the restrictions were limited as to lands HERETOFORE or HEREAFTER *allotted*. There is nothing in the Act anywhere which provides that lands purchased with restricted funds shall be hampered with the imposition of restrictions by the Secretary of the Interior or any one else. It has reference only to the allotted lands. Since it is apparent by the very language of the Act it was not the intention of Congress that restrictions should be imposed upon anything except allotted lands, it becomes necessary for us to observe the provision of the Act by virtue of which the Secretary of the Interior assumes the power to impose restrictions. It reads:

> "Except that the Secretary of the Interior may remove such restrictions wholly or in part under such RULES AND REGULATIONS CONCERNING THE TERMS OF SALE AND DISPOSAL OF PROCEEDS FOR THE BENEFIT OF THE RESPECTIVE INDIAN AS HE MAY PRESCRIBE."

There is nothing in this language which can be construed as conferring upon the Secretary of the Interior the authority to impose restrictions upon lands purchased. It merely gives him the right to dispose of the proceeds for the benefit of the Indian, and when he has done that his authority over the property is at an end. His authority extends no farther than the disposal of the proceeds. In the McCurdy case, *supra*, this Court had before it the consideration of the statute relating to the

Osage tribe of Indians, the language of which is almost identical with the language of Act of May 27, 1908. A part of Section 4 of the Act of April 18, 1912, provides:

> "That the Secretary of the Interior, in his discretion, hereby is authorized, under the rules and regulations prescribed by him, and upon application therefor, to pay to Osage allottees, etc."

It is thus seen that the language of the Act under consideration by this Court in the McCurdy case is identical with the language of the Act under consideration here in so far as it attempts to confer authority upon the Secretary of the Interior to impose restrictions upon alienation of property purchased with released funds. The Osage Indian Act was attacked as being obnoxious to Section 3 of Article 4 and Amendments 9 and 10 of and to the Constitution of the United States, but the opinion does not turn on this question, the Court expressly refusing to decide the case upon that question, using this language:

> "The jurisdiction of this Court was questioned, *but the case is properly here. The constitutional question is substantial,* was properly raised below and was passed upon there. We have, however, no occasion to refer to it, since all questions involved in the case are before us. * * * And there are other grounds upon which the decree must be reversed."

The Court says:

> "There is nothing in the Act or in the facts to which it applies that indicate the purpose to extend control to property in which released funds may be invested."

After quoting the regulations prescribed by the Secretary of the Interior to the effect that the money is to be expended under the supervision of the Secretary of the Interior, it is said:

> *"Like the Act under which they are framed, these regulations contemplate supervision of the expenditures of money, not control of the property, if any, for which the money is expended. They tend to confirm the contention of the appellant that if the money is paid out of the bank, it and the property in which it may be invested are to be free from restrictions.* • • • • While an Indian is still a ward of the Nation, there is power in Congress even to reimpose restrictions on property already freed; *Brader* v. *James*, decided this day, but Congress did not confer on the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from taxation."

The Circuit Court of Appeals, Eighth Circuit, in the Gray and Ransom cases, *supra*, if we understand the holding of the Court, has in effect overruled the Law case, because in the Gray case, after quoting a part of the Act of May 27, 1908, "Except that the Secretary of the Interior may remove such regulations concerning terms of sale

and disposal of proceeds for the benefit of the respective Indians as he may prescribe," the Court makes use of the following language:

> "Conceding that he is to be given authority to dispose of the proceeds for the benefit of the Indian to invest them in real estate, there is no suggestion or intimation of a legislative intention in that clause or section or act or elsewhere, so far as we are advised, that the real estate so purchased shall become exempt. The subject of exemption was in mind when the clause relied upon was under consideration. The section of which it is a part dealt with the disposal of lands that were exempt, and if it was believed that the Secretary was given power to reinvest those funds in other lands, *it is to be assumed that they also would have been declared to be exempt or inalienable if that was intended.* Where the right to claim exemption is rested on legislative purpose to grant it, Mr. Cooley says: 'The intention to exempt must in any case be expressed in clear and unambiguous terms.' Cooley on Taxation, 146."

Later on in the opinion the Court quotes with approval the language of Justice Brandeis in the McCurdy case, *supra,* with this statement: "We think the following remarks in the opinion in that case applicable to this."

While the McCurday, Gray and Ransom cases arose over the power of the state to impose taxes upon property that had been purchased with released funds, the same principle was involved as

in the instant case. Let us pursue this question further.

If the Secretary of the Interior is clothed with the authority to impose restrictions from voluntary sale he is vested with authority to impose restrictions from involuntary sale. A hypothetical case is, if the lands in controversy are subject to taxation under the laws of Oklahoma, and under these decisions it undoubtedly is, then the state has the power to collect the tax. Assuming that the taxes have been levied by the state and are not paid, necessarily a sale must follow for delinquent taxes, and thus divest the grantee of all right in the property. If there is nothing in the Act which prevents an involuntary sale for taxes imposed, then we submit there is nothing in the act which prevents a voluntary sale, because the effect in either case is to divest the grantee of title in the lands. As supporting our contention in this regard we also refer the Court to the case of *United States Fidelity & Guarantee Co.* v. *Hansen, et al.,* by the Supreme Court of the State of Oklahoma, reported in 129 Pac. 60. *Frances* v.. *Frances,* 203 U. S. 233, 238, 51 L. Ed. 165, was an action involving the validity of a restriction against alienation in a patent issued by the President of the United States, the Court said:

> "An inalienable title in fee simple passed by the treaty of September 24, 1819, between the Chippewa Indians to the Children of Bokowtonden, and the patent issued in 1827 required

> the reservation of 640 acres of land contained in said treaty, only located or made definite by boundaries of the tract reserved to them by said treaty. It follows that the words in the patent of 1827: 'But never to be conveyed by them or their heirs without the consent and permission of the President of the United States,' were ineffectual as restrictions upon the powers of alienation. The president had no authority in virtue of his office to impose any such restrictions; certainly not, without the authority of an Act of Congress, and no such Act was ever passed."

The contention that we make here is that the restriction against alienation being one running with the land and not against the Indian personally (*Bowling, et al.* v. *U. S.*, 58 L. Ed. 1080; *Rigley, et al.* v. *McCoy, et al.*, 175 Pac. 259) and the Act itself containing no provision against alienation, the Secretary of the Interior is powerless to embody in a deed a provision against alienation, and if he does so, such provision is illegal and void.

Turning again to the Law case, in all deference to this Honorable Court, we desire to repeat that it is not supported either by the Act of May 27, 1908, reason or logic. The opinion is predicated upon two false assumptions. The opinion assumes that Congress has the power under the Constitution of the United States to invade the rights of the State of Oklahoma and legislate respecting private lands within the state; and,

Second: The opinion assumes that Congress enacted the necessary legislation to authorize the Secretary of the Interior to do precisely the thing the Secretary of the Interior did. At the very threshold of the opinion the Court relies upon the case of *Tiger* v. *Western Investment Company*, 221 U. S. 286, 55 L. Ed. 738, which holds:

> "Congress has had at all times and now the right to pass legislation in the interest of the Indians as a dependent people. * * * That it was within the power of Congress to continue to restrict alienation by requiring as to full-blood Indians the consent of the Secretary of the Interior to a proposed alienation of lands, such as are involved in this case. That it rests with Congress to determine when its guardianship shall cease and while it still continues and has the right to vary its restrictions upon alienation of the Indian lands in the proportion of what it deems the best interest of the Indian."

There was no question involved in the Law case as that decided in the Tiger case, but the quotation above taken from the Law case is cited in support of the opinion of the Court in that case. No one questions the authority of the government under its treaties with the Indians to impose restrictions upon alienation to allotted lands, so long as they remain wards of the government, and yet that was one of the questions before the Court in the Tiger case, which is relied upon to support the holding in the Law case. No question

involved in the Law case involved the power of Congress to legislate respecting the lands of Indians. The only question presented by that case was a construction of the Act of May 27, 1908, involving the power of the Secretary of the Interior under that Act to impose restriction upon alienation. Another case relied upon by that Court in support of its opinion in the Law case is *United States* v. *Gray*, 201 Fed. 291, 119 C. C. A. 529. That case involved the power of the Government to legislate respecting the Indians under Section 8, Subdivision 3 of Article 1 of the Constitution of the United States, when no such question was presented by the Law case nor is any such question presented by this case.

And without taking up each decision, because it would prolong this brief to unreasonable lengths, cited in support of the opinion in the Law case, we desire to make this assertion. That every opinion cited in support of the Law case goes merely to the policy of the government in dealing with the Indians and with the power of Congress to legislate respecting the property of Indians. We desire to repeat here, because we feel that we cannot give too much emphasis to it, that none of these questions were involved in the Law case for a decision of the Circuit Court. On the contrary, the propositions presented by this case and also the Law case, are:

That Congress has no power to legislate respect-

ing unrestricted and privately owned lands within the territorial limits of the State of Oklahoma; neither did Congress attempt to do so by the Act of May 27, 1908. The only power given the Secretary of the Interior by that Act is to release retrictions against alienation in certain cases and "disposal of the proceeds" derived from the sale of restricted lands. It gives him no authority and no power to reinvest the proceeds in other lands but only power in disposing of the proceeds, and to read into the Act a provision that the Secretary of the Interior has a right to impose restrictions against alienation on lands purchased with released funds is to read something into the act that is not there, and that no fair judicial interpretation can consistently place there.

In *Brader* v. *James,* 246 U. S. 88, this Court holds:

That while an Indian is still a ward of the nation there is power in Congress to reimpose restrictions on property already freed. This opinion has, perhaps, been less understood than any other opinion on the subject, because the trial courts have fallen into the error of making no distinction in the question really involved in that case and one like the instant case. The Act itself starts out by saying: "The status of lands heretofore and hereafter allotted, etc", and refers specifically *to allotted lands.* In the Brader case the lands were originally allotted and the lands were still

in the name of the original allottee when Congress reimposed restrictions. In the Brader case Congress took action and reimposed restrictions, although we seriously doubt the power of Congress to do so under the constitutional provision herein discussed. But, as pointed out in the McCurdy case, there is a decided difference with a substantial distinction, "but Congress did not confer upon the Secretary of the Interior authority to exercise such power under the circumstances of this case or to give to property purchased with released funds immunity from state taxation." Had it been in the mind of Congress to clothe the Secretary of the Interior with power to impose restrictions against alienation it would have closed the door to all doubt by saying so.

It follows as a necessary conclusion that if the real property involved was unrestricted property at the time of its conveyance to Nathaniel Perryman, the State Courts had jurisdiction and the United States Court had and has no jurisdiction and that the judgment and decree of the Superior Court of Tulsa County, State of Oklahoma, is valid and binding upon the parties. A copy of said judgment and decree will be found at page 12 of the record. Before this judgment was rendered the United States by James S. Watson, U. S. Probate Attorney, appeared in his offiicial capacity as attorney for said defendants and procured an order withdrawing from the files the separate answer of

Nathaniel Perryman and procuring an allowance of thirty days from the date to further plead, and thereby the United States conceded the jurisdiction of the State Court over the subject matter and the parties. (See Exhibit "E" on page 20 of the transcript of the record.)

As reflecting the intention of Congress, there remains yet another section of the Act of May 27, 1908, to be considered. Section 5 of the Act provides:

> "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

It is plain to be seen, by a consideration of the whole Act, that it was intended to be the policy of the government, in so far as possible, to cast the Indian upon his own resources.

First: By conferring authority upon the Secretary of the Interior to release restrictions against alienation; and

Second: By granting unto the Secretary of the Interior the authority to dispose of the proceeds of the restricted lands for the benefit of the In-

dian and when the investment is once made, all the authority of the Secretary of the Interior immediately ceases.

From the language of Section 5, *supra*, it is very evident that such was the intention of Congress because that section specifically provided

> "• • • that any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the *land allotted to allottees of the Five Civilized Tribes prior to the removal of restrictions therefrom* • • • • shall be absolutely null and void."

Had it been the intention of Congress to restrict the property against alienation purchased by the Secretary of the Interior with funds derived from the sale of released lands, it would have said so.

All the way through the Act, restrictions are limited to *allotted lands*, and nowhere in the Act, even by implication, does it appear that Congress intended even remotely to impress upon lands purchased with released funds, the imposition against alienation.

The enabling act for the admission of Oklahoma as a state, is a contract between the United States and the State of Oklahoma (*Coyle* v. *Smith*, 221 U. S. 559) Chapter 3335, U. S. Stat. 1909-1906, Part 1, page 267, Section 3, Paragraph 3, strictly provides:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned and held by any Indian Tribe or Nation; and that until the title to such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States. That land belonging to citizens of the United States residing without the limits of said state shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its uses."

It is thus seen that by the Enabling Act itself the power of the United States is extended no farther than to lands held by an Indian, Tribe or Nation, and the property belonging to the United States. This one provision is sufficient to settle this question in favor of the appellant.

It must be borne in mind that the lands in dispute here were neither Indian lands nor lands of the United States and had not been such for a number of years prior to the purchase of the same from Grant R. McCullough and Clara E. McCullough, his wife, and Lawrence K. Cone and Kate P. Cone, his wife, which purchase was made on the 24th day of June, 1918. The lands had long prior

to that time been released from all restrictions and had become and were the subject of barter and sale and trade and commerce among the people of this state. The Enabling Act itself provides:

> "* * * *and that until the title to such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal and control of the United States."

The lands involved in this controversy having long since passed from the jurisdiction and control of the United States, it was not within the power of Congress, as we have seen by the constitutional provisions herein cited, to reimpose restrictions on released lands and no such attempt is made by Congress, either in the Act of May 27, 1908, nor the Enabling Act.

To us it is a legal absurdity to say that the lands in controversy, over which the United States had no jurisdiction or control whatever, either directly or remotely, so long as the title to same remained in Nathaniel Perryman's grantors, that the Secretary of the Interior could by purchasing take them entirely without state control, jurisdiction or authority by imposing a restriction against alienation. Congress is without authority to enact such a law, neither has it attempted to do so. Let us suppose that a cloud rested upon the title of the lands in controversy at the time of the sale to Nathaniel Perryman. So long as that title

was reposed in his grantors the Courts of the United States were not open to them to remove the cloud because they were not Indian lands nor property of the United States. Such a question is one purely of state control.

Another question to be considered is that presented by the clause in the deed preventing alienation without the consent of the Secretary of the Interior. It may be urged that the provision constitutes a contract between the grantor and the grantee. This suggestion has no appropriate place in this case for the reason that admitting without conceding that such is the case, the government of the United States is not the proper party to raise such a question. That question can be raised only and solely by the grantors themselves, and that was litigated in the State Court by the judgment set aside in this law suit.

We make this further pertinent suggestion that under the circumstances of the purchase from the grantors to Nathaniel Perryman, that so far as he was concerned, the latter was neither consulted nor in any way advised within regard to the purchase of this land. The transcript shows that permission was asked of the Secretary of the Interior to invest the amount of the purchase price in this identical land. His answer was to "use the restricted form of deed" so in that connection we suggest that there is no contract between the grantors and grantee. Such a transaction does not

rise to the dignity of a contract. But, however, treating the restriction against alienation as a contract between the grantor and the grantee, the Courts, with almost unbroken unanimity, hold that such a provision in a grant of this character, *is absolutely null and void.*

The theory upon which the holding of the Courts is predicated is that the grant of a fee simple title is repugnant to a provision against alienation.

—*Latimer* v. *Wedell,* 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N.S.) 668, and note;

—*Bennett* v. *Chapin,* 77 Mich. 538, 43rd N. W. 893;

—*Kessner* v. *Phillips,* 189 Mo. 515, 88 S. W. 66.

Or in other words, one is opposed to the other, and can not co-exist in the same instrument of conveyance.

Some of the early text writers laid down the proposition that a reasonable restraint against alienation under certain cases would be upheld, but these holdings have been to a large extent based on a misconception of certain early English cases, and on principle and authority the better rule is that a direct restriction for any time, however short, is absolutely void.

In those cases where a restriction against alienation is upheld, an examination of the authorities

will disclose that the ultimate party to be benefited by the restriction was not the immediate grantee but some third party to whom the estimate should go after certain limitations.

These authorities are all accumulated and discussed in the note to *Elizabeth Latimer* v. *Alfred M. Wadell*, 3rd L. R. A. (N.S.) 668, *supra*.

The right to traffic in real estate is as ancient as the law itself, and forms no inconsiderable amount of our commercial transactions, and the control of such transactions is exclusively a state question, and under the constitution the Federal government is powerless to hamper such transactions with the imposition of restrictions, or to authorize its executive or ministerial officers to do so.

Turning now to a consideration of the opinion by the Circuit Court of Appeals (Rec. pp. 98, 99, 100, 101), in justice to ourselves we feel impelled to say that we have felt that an injustice was done the attorneys for the appellant by the position assumed by that Court.

We quote:

> "Counsel attack the constitutionality of this provision of the Act on three grounds:
>
> 1. That it is a delegation of legislation to the excutive department, which is not permissable.
>
> 2. That as these Indians are no longer resid-

ing in a territory of the United States, but in a state of the Union, Congress is without power to legislate for the protection of their property, but they must look to the state alone for it.

3. That the National Government can only deal with Indians by treaty and not by Act of Congress."

We assert that none of these questions were urged in either the oral argument or brief, and we assert, also, that we filed the same brief in that Court that we have filed here, except a few minor changes. Therefore, it is very evident that the real questions involved in this appeal were never decided by the Circuit Court of Appeals, because the opinion of the Court is cast upon a false assumption as to the real questions involved.

As we view the law, none of the authorities cited by that Court in support of its opinion have any bearing on the questions we have urged in this brief, except *United States* v. *Law,* 250 Fed. 218, 162 C. C. A. 354. The opinion by the Circuit Court of Appeals is predicated exclusively upon the policy of the Federal Givernment in dealing with property belonging to the Indians. As no such question is involved in this appeal, we deem it a useless waste of time to consider that phase of the question and will content ourselves by referring briefly to some of the authorities cited by the Court in support of its opinion.

United States v. *Thurston County*, 143 Fed. 287, 74 C. C. A. 425, was an action involving the power of Thurston county to collect taxes from certain lands of the Omaha Winnebago tribes who resided in that county, on account of the proceeds of the sale of the inherited lands deposited by the Secretary of the Interior, then in a bank. The lands sold under the authority of the Secretary of the Interior were restricted, the same being allotted lands. The instant case would furnish an illustration of the rule announced by the Court in the Thurston County case, had the proceeds from the sale of a portion of Nathaniel Perryman's homestead allotment been in some way attacked while they remained in the hands of the Secretary of the Interior.

As we view the opinion it can be of little or no benefit to the Court in deciding the questions presented by this appeal.

National Bank of Commerce v. *Anderson*, 147 Fed. 87, involved this question:

That where lands were allotted to an Indian Citizen under the allotment act of 1877, restraining alienation for 25 years, the act of 1902 did not vacate the trust over such lands held by the United States. We cannot see that this opinion has any bearing whatever on any question involved in this appeal.

U. S. v. *Yakima County, et al.*, 274 Fed. 115,

involved the allotment act of February 8, 1887, which in part provides:

> "Patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust for the sole use and benefit of the Indian to whom said allotment shall have been made or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust, and free of all charge or incumbrance whatsoever; Provided, that the President of the United States may in any case in his discretion extend the period, and if any conveyance shall be made of the land set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void."

Section 1 of the Act of May 29, 1908 (35 Stat. 444) (Comp. St. 4224), provides:

> "That when any Indian who has heretofore received or who may hereafter receive an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold

as hereinbefore provided; *Provided, that the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs*: And provided further, that upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold."

It is seen by these provisions that the lands allotted should be restricted for a period of twenty-five years for the sole use and benefit of the Indian to whom the allotment should be made; and also provided further that if the lands were sold that the *proceeds derived from such sale should be used during the restricted period for the benefit of the allottee or heir,* which goes much farther than the Act of May 27, 1908, relating to the Five Civilized Tribes. Each of these cases is hypothecated upon some act of Congress with reference to some tribe of Indians, and each of these opinions are squarely against the holding by the Eighth Circuit Court of Appeals in *U. S.* v. *Gray,* 284 Fed. 103, and *U. S.* v. *Ranson,* 284 Fed. 108, where it was expressly held that the State of Oklahoma had the authority to levy and collect taxes against lands purchased with released funds, the instrument of conveyance containing a clause against alienation. The Law case, *supra,* is not a case definitely in point, there being this distinction between that case and the instant case: In

the Law case the Indian was a full blood Cherokee and under the law was incapable of executing an instrument of conveyance of any kind, either to her allotment or surplus land. In the instant case Nathaniel Perryman is a one-half blood Creek Indian and is capable of executing an instrument of conveyance to all of his surplus lands. Concluding this argument, we are forced to the conclusion that the lands in dispute here, when purchased with released funds, became merely the surplus lands of Nathaniel Perryman, and there was no law at the time of the execution of the deed against alienation of such lands.

THIRD PROPOSITION

The decree and judgment of the Court are not supported by sufficient evidence. The appellee before being entitled to a judgment was required to prove, first, that the real estate involved was subject to the Jurisdiction of the United States District Court; Second, that if the Secretary of the Interior had authority under the law to impose restrictions upon unrestricted land after it had passed from the Nation and allottee, then and in that event it became encumbant upon the appellee to prove some general or special order or authority by which he attempted to impose restrictions upon this particular land and that this general or special order or authority was of record in some office giving constructive notice that such

order or authority was in existance.

We submit that no competent evidence whatever was introduced by the appellee to sustain either proposition. In an effort to prove the authority of the Secretary of the Interior, the appellee first introduced in evidence over the objections of the appellant, his Exhibit "2" record Page 61, purporting to be a latter from the First Assistant Secretary of the Interior, dated September 29, 1910, authorizing the Superintendant of the Five Civilized Tribes to disburse from the proceeds of sale allotted lands not to exceed the sum of $250, and that any residue, after such disbursement, should be deposited in the usual manner, subject to the further orders of the department, and further providing that if the total of the item authorized above exceeds the amount received from the sale, this authority must be modified before any disbursements are made, except the cash payment to the allottee. This instrument is a mere letter from the Assistant Secretary of the Interior and had no place in any public record affecting this land and does not purport to authorize the investment of the proceeds of the sale in real estate, nor does it purport to authorize the imposition of restrictions upon any real estate purchased with the proceeds of such sale. We therefore submit that the said letter was irrelevant, immaterial and did not tend to prove any issue in this case,

and that no proper foundation was laid for its introduction and the Court below erred in overruling the appellant's objection to the introduction of said letter in evidence.

The appellee next offered in evidence the order of the Secretary of the Interior removing restrictions from a portion of the homestead of Nathaniel Perryman, but there is nothing in this order authorizing the purchase of unrestricted land nor the imposition of restrictions thereon.

The appellee next offered in evidence its Exhibit 4, Record Page64, purporting to be a letter from the Acting Superintendant of the Five Civilized Tribes, to the Commissioner of Indian Affairs. This letter was not only incompetent, irrelevant and immaterial, but no proper foundation was laid for its introduction, as it contains no evidence or authority of the Secretary of the Interior to purchase unrestricted lands, nor to impose restrictions thereon.

Appellee next introduced in evidence over the objection of the appellant, a purported copy of a telegram signed by Hauke, acting Assistant Commissioner, purporting to authorize the Superintendent of the Five Civilized Tribes to invest on behalf of the defendant, Perryman, $9600 in the purchase of property therein described, using restricted form of deed. No proper foundation was laid for the introduction of this instrument in evidence,

as there was no evidence showing the authority of the Acting Assistant Commissioner to purchase real estate, and if the Secretary of the Interior attempted to authorize the Acting Assistant Commissioner to do so, his act was void under the authorities heretofore cited. This instrument is not recorded in the records of any office and was not constructive notice to the appellant or the public.

In a further effort to prove the authority of the Secretary of the Interior to impose restrictions upon unrestricted land, the appellee offered in evidence over the objections of the appellant, (record, page 68) a letter or instrument purporting to have been written by Samuel Adams, First Assistant Secretary to Dana H. Kelsey, Superintendent Union Agency, relative to the conveyance of certain lands in Johnson County, Oklahoma, by Selina Latcher, nee Underwood, a full-blood Chickasaw Indian, and does not in any manner involve the trasaction in the case at bar, and does not purport to confer upon the Secretary of the Interior or the Superintendant of the Union Agency any authority to invest the proceeds of the sale of Nathaniel Perryman's homestead in unrestricted real estate, nor to impose restrictions upon such unrestricted real estate.

The Appellee next introduced in evidence a warranty deed in blank not purporting to have been executed by any person, to the introduction of which

instrument in evidence the appellant objected for the reason that the same was incompetent, irrelevant and immaterial and that no proper foundation was laid for its introduction. Said instrument will be found at Record, pages, 70 and 71.

The appellee next introduced in evidence, over the objection and exception of the appellant, a letter purporting to have been written by Samuel Adams, First Assistant Secretary to Dana H. Kelsey, Supt. Union Agency. This letter relates exclusively to Indians of the Five Civilized Tribes who should receive funds due them in *lieu* of allottments and has no reference whatever to Indians to whom allottments had been made, nor to the disposition of funds derived from the sale of allotted lands, and was wholly incompetent, irrelevant and immaterial to any issue in the case at bar. The certificate attached to this instrument does not purport to be signed by any person, but the line for signature is blank and thereunder is printed "United States Indian Superintendant."

The appellee next introduced in evidence over the objection of the appellant a letter purporting to have been written by Joe H. Stran, Acting Superintendant of the Five Civilized Tribes to the Commissioner of Indian Affairs. This letter has no place upon the public records of any offiice and does not purport to prove any authority from the Secretary of the Interior, authorizing the imposi-

tion of restrictions upon unrestricted land. Several other instruments were offered in evidence but not one of them tend to prove that the Secretary of the Interior had made any general or special order authorizing the imposition of restrictions upon unrestricted lands. For instance, plaintiff's exhibit 9, page 67, purports to be a telegram received from Hauke, Acting Assistant Commissioner to Parker, Superintendant, purporting to authorize the investment on behalf of Nathaniel Perryman. $9600, in purchase of property described therein, using restricted form of deed. There is no evidence that the Secretary of the Interior authorized the Acting Assistant Commissioner to require the use of the restricted form of deed, and no evidence that the Secretary of the Interior had ever attempted to delegate the authority, if any he had, to impose restrictions upon unrestricted land.

Appellee's exhibit 10 is a certificate that the annexed photographic copies of checks No. 8681, and 9146 are true copies of the original checks on file in the Department, copies of checks following.

Appellee's Exhibit No. 11 is a deed from Grant R. McCullough et al., to Nathaniel Perryman, conveying the lands in controversy.

Appellee's Exhibit No. 12 purports to be a deed from Nathaniel Perryman to Fannie Perryman conveying the lands involved.

Appellee's Exhibit No. 13 purports to be a re-

ceipt from Eldon Lowe of a certain check signed by L. K. Cone and Grant R. McCullough.

Exhibit 14 purports to be a certificate signed by E. B. Merritt that the papers attached there are true copies.

Appellee's Exhibit 15 purports to be a confirmation of copy of office telegram sent by C. P. Hauke, Acting Assistant Commissioner to Parker, Superintendent, purporting to grant authority to the Superintendent to invest on behalf of Nathaniel Perryman, $9600 in purchase of property therein described, using restricted form of deed.

Appellee's Exhibit 16 is certificate that the foregoing telegram is a true copy of the original.

To the introduction of all of these instruments in evidence the appellant objected for the reason that they were incompetent, irrelevant and immaterial and that no proper foundation had been laid for their introduction.

We therefore submit, in conclusion, that:

First: Congress is without power or authority to legislate so as to hamper with the imposition of restrictions the free trade and commerce of the lands within a state upon which there exists no restrictions against alienation and which have become subject to the taxing power of the state, and the judgments, orders and decrees of the Courts of the State that might be rendered against the owner of such real estate, and

in favor of his creditors, and further, so as to hamper or interfere with the free trade and commerce of such real estate among the people of the State, and of the several states.

Second: That if Congress has such power, then the Act of May 27, 1908, confers no such power or authority upon the Secretary of the Interior; and,

Third: That the evidence in this case wholly fails to estbalish a cause of action in favor of the appellee nad against the appellant for the reason that none of the evidence introduced as exhibits was properly admitted in evidence for the reason that the exhibits were not properly identified. That no proper foundation had been laid for their reception in evidence; that there was never introduced in evidence any general or special rules or orders promulgated by the Secretary of the Interior showing that he exercised in this particular case, or for that matter in any other case, the power conferred upon him by congress to impose restrictions upon unrestricted land purchased with released funds.

For these reasons we most respectfully submit that the case should be reversed and that the judgment should be rendered in favor of the appellant.

J. M. Springer,
W. H. Thompson,
E. G. Wilson,
Attorneys for Appellant.